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No. 93-1748

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LILLIAN SOLOMON, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
as Receiver for Nassau Savings and
Loan Association, F.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

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12 pp

TABLE OF AUTHORITIES

CASES — Page

Armstrong v. *United States*, 364 U.S. 40 (1960) 6
BFP v. *RTC*, 114 S. Ct. 1757 (1994) 2, 5, 10
Bateman v. *FDIC*, 970 F.2d 924 (1st Cir. 1992) 9
Begier v. *IRS*, 496 U.S. 53 (1990) 8
Butner v. *United States*, 440 U.S. 40 (1979) 4
In re Chicago, R.I. & Pac. R.R., 772 F.2d 299 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986) 8
Cipollone v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) 6
DeSantis v. *White Rose Assocs.*, 578 N.Y.S. 2d 363, 367 (N.Y. Sup. Ct. 1991) 3
Forbes v. *FDIC*, 1994 U.S. Dist. LEXIS 8682 (D. Mass. Apr. 29, 1994) 2
General Motors Corp. v. *Romein*, 112 S. Ct. 1105 (1992) 6
In re Harris Pine Mills, 862 F.2d 217 (9th Cir. 1988) 8
O'Melveny & Meyers v. *FDIC*, No. 93-489 (June 13, 1994) .... *passim*
Patterson v. *FDIC*, 918 F.2d 540 (5th Cir. 1990) 9
RFC v. *Beaver County*, 328 U.S. 204 (1946) 4
Saravia v. *1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823 (D.C. Cir. 1988) 8, 9
In re Topco, Inc., 894 F.2d 727 (5th Cir. 1990) 8
United States v. *Kimbell Foods*, 440 U.S. 715 (1979) 5
United States v. *National Bank of Commerce*, 472 U.S. 713 (1985) 5
United States v. *Security Indus. Bank*, 459 U.S. 70 (1982) 7

STATUTES

11 U.S.C. § 365 .... 8, 9
12 U.S.C. § 1813 4
§ 1821 .... *passim*
§ 1823 9
N.Y. City Rent Control Law § 26-408.a 3

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1. The RTC cannot and does not dispute that this is a case of profound nationwide practical importance. This case was chosen by RTC's Board of Directors as a "precedent setting" vehicle to establish throughout the country the RTC's power, in its own words, "to preempt state law in the area of rent control and rent stabilization." R. 269. RTC, and its sister agency, FDIC, thus stand poised if certiorari is denied to begin the evictions not only of 93-year old Lillian Solomon from her family home of 32 years, and the other petitioners, but also thousands of other rent-controlled tenants in New York and a substantial number of other states. See Pet. 7, 12; Brief of

Amicus Curiae City of Boston, at 1-2.[1] This Court may well not consider another case in the upcoming Term that directly and dramatically affects so great a number of Americans. The broad impact that this Court's certiorari determination will have strongly supports each of the alternative forms of relief sought by petitioners, which are discussed below.

2. At a minimum, the Court should grant certiorari, vacate the decision of the Second Circuit preempting New York's rent control laws, and remand the case for reconsideration in light of *BFP* v. *RTC*, 114 S. Ct. 1757 (1994), and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994).

a. Like the Second Circuit, the RTC simply ignores the legal standard of *BFP*, pursuant to which 12 U.S.C. § 1821(e) can be construed to preempt state real property law only if the intent to do so is "unambiguous." 114 S. Ct. at 1765; *see id.* (no preemption "where the intent to override is doubtful"); *id.* (purpose to preempt "must be 'clear and manifest' "). The failure of the Second Circuit to employ the correct preemption standard set forth in this Court's subsequent *BFP* decision, by itself, justifies a remand.

It is equally evident that applying the *BFP* standard, Section 1821(e) does not preempt New York's rent control laws. Under *BFP*, to justify preemption, RTC must show that it was the *unambiguous* intent of Congress

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[1] As amply demonstrated by the Brief of Legal Services for New York City, *et al.*, As *Amici Curiae*, at 16-17, RTC and FDIC could further extend their eviction policy to low-income tenants at any time. Moreover, RTC does not dispute that under the express rationale of the Second Circuit's decision, 12 U.S.C. § 1821(e) preempts state statutory and common law obligations to provide essential services as well as the warranty of habilitability, which harms all tenants regardless of wealth. Pet. App. 14a, 16a. *Cf. Forbes* v. *FDIC*, 1994 U.S. Dist. LEXIS 8682 (D. Mass. April 29, 1994) (citing Second Circuit's decision, FDIC contends that it does not have to comply with service and safety obligations of state housing code).

both: (1) to create a federal law definition for the term "contract or lease"; and (2) that such a federal definition reaches obligations imposed by state housing laws that are not created and cannot be altered by any agreement, contract, or lease. Neither proposition is supportable.

First, there could be no preemption if New York law were used to define what is a "contract or lease" because New York law squarely (and repeatedly) holds that the rights of occupancy of both rent-controlled and rent-stabilized tenants are *"not pursuant to any agreement* with the owner but *solely* by virtue of the emergency rent laws." *DeSantis* v. *White Rose Assocs.*, 578 N.Y.S. 2d 363, 367 (N.Y. Sup. Ct. 1991) (emphasis added). Petitioners cited three additional cases to the exact same effect. See Pet. 21 & n. 13.[2]

RTC does not even address these decisions, preferring to assume that, if it states that no New York court decision addresses whether rent control obligations are independent of the contract or lease often enough, then it will be so. See Resp. 7, 8, 11. Even more ludricrous is RTC's suggestion that the Second Circuit used state law to "determin[e] the meaning of the reference to a 'lease' in Section 1821(e)" and that this Court should defer to this purported interpretation of state law by the Second Circuit. Resp. 15. What the Second Circuit actually held was: "[T]he definition of the phrase 'contract or lease' is a matter of federal law . . . . *[W]e are not bound by any state court pronouncements regarding the breadth or scope of these terms* . . . ." Pet. App. 13a (emphasis added).[3]

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[2] Indeed, this answer is compelled by New York statutory provisions that explicitly state that rent control obligations apply "notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated." N.Y. City Rent Control Law § 26-408.a; *see also* Pet. 8-9. Lillian Solomon, for example, *has no lease*.

[3] Of course, deference here should properly be accorded to the New York Attorney General's interpretation of state law. His petition convincingly demonstrates that under New York law statu-

Neither the Second Circuit nor the RTC can show, and neither attempts to show, the unambiguous intent of Congress that is necessary under *BFP* to have the federal courts create a federal law definition of the term "contract or lease" in Section 1821(e) that preempts state law. All the indicia support adopting state law for the definition:

(1) FIRREA contains an extensive section of federal definitions for 50 terms used in the statute. See 12 U.S.C. § 1813. Congress omitted a federal definition of "contract or lease." As this Court recently held, "matters left unaddressed [by FIRREA] are presumably left subject to the disposition provided by state law." *O'Melveny & Myers* v. *FDIC*, No. 93-489, slip op. at 6 (June 13, 1994).

(2) Section 1821(e) refers to any "contract or lease . . . *to which such institution is a party*." (Emphasis added.) In *O'Melveny & Myers*, this Court held that similar phraseology—"rights . . . *of the insured depository institution*" in 12 U.S.C. § 1821(d)(2)(A)(i)—required the courts to apply state law because state law indisputably governed the rights of the institution "prior to receivership." Slip op. at 6-7. So too here. Only state law can answer whether the obligation of an institution as landlord "prior to receivership" was imposed by contract or lease.

(3) The very words "contract or lease," particularly as applied here to real property, are traditionally governed and defined by state law. This Court has adopted state law to define similar terms when they appear in federal statutes. *See, e.g., RFC* v. *Beaver County*, 328 U.S. 204, 210 (1946) ("real property"); *Butner* v. *United States*, 440 U.S. 40, 55 (1979) ("the interest of

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tory tenancy obligations are independent of any contract or lease. *See* 93-1757 Pet. 4, 13-14. If there were any doubt, on remand, the Second Circuit can certify the appropriate issue to the New York Court of Appeals. *See* Pet. 22 n.14.

a mortgagee in rents earned by mortgaged property"). Indeed, *BFP* itself emphasizes that the regulation of real property is perhaps the quintessential area where federal statutes should be construed to defer to and, indeed, "to adopt, rather than to displace, pre-existing state law." 114 S. Ct. at 1764-65. Obviously, the Second Circuit refused to do that here.[4]

Second, even if a federal definition were appropriate for "contract or lease" in Section 1821(e), neither the Second Circuit nor RTC has demonstrated unambiguous Congressional intent—as required by *BFP*—that such a definition be stretched to include obligations imposed by state real property law even when there is no contract or lease or when the contract or lease provides to the contrary. RTC and the Second Circuit both seek to stretch the term "contract or lease" to include obligations imposed by state statute on parties to a relationship that is "ultimately based on a lease or other voluntary contractual arrangement" even though those obligations are not set forth in and indeed contradict some long-ago contract or lease. Resp. 8 (quoting Pet. App. 15a). Even if this were a reasonable interpretation of "contract or lease," not even RTC (or the Second Circuit) can contend that it is the only reasonable interpretation, which is what *BFP* requires for preemption. Compare Resp. 7 ("the court of appeals' conclusion . . . is *a* reasonable one") (emphasis added).

Numerous factors support a contrary construction. (1) RTC concedes that the natural meaning of "contract

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[4] The cases cited by RTC do not involve traditional state-law terms. *See* Resp. 9-10. In particular, *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985), involved the definition of personal property, not real property, in a tax-collection statute. This Court has emphasized that unique considerations of uniformity and revenue raising support judicial creation of federal law to vindicate the interests of the United States in tax collection and that these considerations do *not* apply to the interests of federal insurers such as RTC. *See O'Melveny & Myers* v. *FDIC*, No. 93-489, slip op. at 8-9 (June 13, 1944); *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 729-32, 735-37 (1979).

or lease" is an obligation created by agreement. Resp. 7; see Pet. 23-24. Here, New York's statutory tenancy obligations are created by state law notwithstanding the absence of any current lease agreement, or the presence of a current lease provision to the contrary. See Pet. 8-9. (2) The language of other provisions in Section 1821(e) plainly evinces congressional understanding that the statute reaches only obligations imposed by the lease or contract itself. See, *e.g.*, § 1821(e)(5)(A) ("term of the lease"); § 1821(e)(5)(B)(i)(I) ("contractual rent"). (3) Prior to the adoption of FIRREA, courts had construed "contract" or "lease" in 11 U.S.C. § 365(a) not to preempt state rent control and other housing laws. *See infra* pp. 8-9. (4) This Court's decisions similarly express the understanding that state statutory obligations imposed on parties to a contract cannot be equated with or considered part of the agreement of the parties. See *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2622 & n.24 (1992); *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1109-11 (1992). RTC does not dispute that these cases so hold, but instead states that "[t]he court of appeals' analysis did not treat obligations imposed under [New York's rent regulation laws] as part of the contract." Resp. 12. Once again, the express language of the Second Circuit's decision belies RTC's attempts to refashion it. See Pet. App. 19a ("Rent control, like rent stabilization, affects the lease by statutorily altering and *specifying certain terms*, chiefly by granting the tenant a statutory renewal option.") (emphasis added); *id.* at 14a (state law obligations imposed on landlords are "read . . . into residential-lease contracts").[5]

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[5] Petitioners previously demonstrated that RTC's broad interpretation of "contract or lease" in Section 1821(e) would also improperly create a taking of petitioners' state-law created property interests under *Armstrong* v. *United States*, 364 U.S. 40, 48-49 (1960). Pet. 26 & n.16. RTC's sole response is that this is a "reorganization" case. Resp. 13. This ignores the settled law that actions taken in a federal reorganization proceeding are "subject to the

In sum, RTC cannot dispute that *BFP* satisfies what the government itself has set forth as the appropriate basis for a remand: that "it is possible that [*BFP*] . . . . will shed light on the proper analysis to be used in deciding this case." Pet. 20 (citation omitted). Indeed, *BFP* does much more—it strongly supports reversal of the decision below.

b. This case should also be remanded for reconsideration in light of *O'Melveny & Myers*. Petitioners' Supplemental Brief sets forth three stark conflicts between *O'Melveny* and the decision below. Supp. 3-4. The RTC simply ignores the first two. See Resp. 15; compare *supra* p. 4. As to the third conflict—the Second Circuit's expressed desire to enable RTC to recover "more money," compare *O'Melveny*, slip op. 9—the RTC's only response is that the Second Circuit only relied on the "more money" argument in interpreting Section 1821 (e)(5). This argument is both puzzling and wrong. It is puzzling because, at a minimum, the Second Circuit should reconsider its erroneous construction of that provision, which RTC makes no effort to defend. Compare Pet. 23 n.15. The RTC is wrong because the discredited "more money" rationale permeates the Second Circuit's interpretation of Section 1821(e)(1) as well. *See* Pet. App. 12a (interpretation designed to create "a tool for maximizing net asset values"); *id.* at 23a (expressing desire "to strengthen RTC's hand in remedying a national economic emergency"). *O'Melveny* thus directly undermines a proposition vital to the decision below. This alone strongly supports remand.

3. The profound practical importance combined with the serious conflicts with decisions of this Court provide ample basis for this Court to exercise plenary review.

Fifth Amendment's prohibition against taking private property without compensation." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 75 (1982).

Conflicts between the decision below and decisions of other circuit courts further support plenary review.

a. RTC does not dispute that 12 U.S.C. § 1821(e) and 11 U.S.C. § 365(a) are sufficiently similar and related that conflicts in interpretation of these provisions warrant review by this Court. *Cf. Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). Two such conflicts exist.

i. Circuits courts, contrary to the decision below, have adopted state law to define what is a "contract" or "lease" under 11 U.S.C. § 365(a). Notwithstanding RTC's protestations, the language of the decisions creating this conflict is plain and unequivocal. See, *e.g.*, *In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990) ("state law determines whether these contracts constitute unexpired leases subject to Section 365"); *In re Harris Pine Mills*, 862 F.2d 217, 220 n.5 (9th Cir. 1988) ("what constitutes a lease . . . , depends on state law, not on the Bankruptcy Code").

ii. RTC concedes that *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823 (D.C. Cir. 1988), and *In re Chicago, R.I. & Pac. R.R.*, 772 F.2d 299 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986), are cases where it was held that state rent control or other housing laws supplied the terms and conditions for tenancies that continued after rejection of the lease. Resp. 13-14. But that is precisely this case. RTC can repudiate whatever lease agreement exists with a given tenant;[6] but even the Second Circuit concedes that after rejection of a lease agreement, Section 1821(e) provides for the tenant to remain for some period of time at some rent. See Pet. App. 24a-26a. *Saravia* and *Rock Island* hold that the terms and conditions of that continued tenancy—which include duration and rent—must comply with state statutory obligations imposed on all landlords. As *Saravia*

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[6] Of course, Lillian Solomon does not even have a lease to repudiate.

held: "[T]he public obligations imposed by [state] law are simply not implicated by the right of rejection. Rejection of the leases did no more than release the debtor from the contractual obligations undertaken in those leases. The debtor does not cease to be a landlord simply by virtue of rejection of the leases, and there is no reason to exempt the [debtor] from obligations imposed by local law on all landlords." 844 F.2d at 826-27; see also *id.* at 827 ("the obligations imposed by [state statute] . . . are independent of private leases."). Of course, the Second Circuit held precisely the opposite. See Pet. App. 20a. Cementing the conflict is the fact that *Saravia* expressly relied on a prior lower court decision holding that the term "contract" or "lease" in 11 U.S.C. § 365(a) did not preempt *New York's* rent control laws. *See* 844 F.2d at 826 (citing *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986)).

b. *Bateman* v. *FDIC*, 970 F.2d 924, 927-28 (1st Cir. 1992) (Breyer, C.J.), and *Patterson* v. *FDIC*, 918 F.2d 540, 543-45 (5th Cir. 1990), hold that obligations imposed by state law do not fall within the word "agreement" under 12 U.S.C. § 1823(e). RTC concedes that the words "contract or lease" under Section 1821(e) go no further than obligations "derived from . . . an agreement." Resp. 7. But RTC contends that this case is distinguishable from *Bateman* and *Patterson* because in this case the relationship "commence[d] with an agreement." Resp. 13. The problem for RTC is that the relationship in *Patterson* also commenced with an agreement (a mortgage), see 918 F.2d at 541, and the relationship in *Bateman* commenced with the owner's consent that the contractor do work, see 970 F.2d at 927. *Patterson* and *Bateman* thus squarely hold that obligations imposed by state law on parties to a relationship are not part of an "agreement" under FIRREA simply because the relationship was commenced by agreement or consent. As RTC concedes (Resp. 13), the decision below holds to the contrary.

For the foregoing reasons, and those previously stated, the petition should be granted. In the alternative, the petition should be granted, the decision below vacated, and the case remanded for reconsideration in light of *BFP* v. *RTC*, 114 S.Ct. 1757 (1994), and *O'Melveny & Myers* v. *FDIC*, No. 93-489 (June 13, 1994).

Respectfully submitted,

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